Supreme Court, U.S.
FILED

No. 021414 MAR 19 2003

In The

Supreme Court of the United States

GRAND FORKS PROFESSIONAL BASEBALL, INC., *et al.*,

Petitioners,

v.

THE NORTH DAKOTA WORKERS COMPENSATION BUREAU,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Do the petitioners enjoy property interests, protected by the Due Process Clause of the Fourteenth Amendment, in asserting and litigating, in state administrative agency adjudicatory proceedings, the defenses of laches and *res judicata*, defenses which would have exonerated the petitioners from any financial liability, as purported statutory guarantors, to the North Dakota Workers Compensation Bureau, a state agency?

PARTIES

The parties to the proceedings before the Supreme Court of North Dakota were petitioner individuals William Coutts, Jack Geller, David C. Thompson, and petitioner North Dakota corporation, Grand Forks Professional Baseball, Inc., and respondent, North Dakota Workers Compensation Bureau, an administrative agency of the State of North Dakota.

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OPINIONS BELOW

The Supreme Court of North Dakota issued its opinion and judgment on December 20, 2002, rejecting the petitioners' arguments that North Dakota Century Code § 65-04-26.1, on its face, and/or as it was applied to the petitioners, was violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See, *Grand Forks Professional Baseball, Inc. v. North Dakota Workers Compensation Bureau*, 2002 ND 204, ¶¶ 17-18, 654 N.W.2d 426, 431 (N.D. 2002) (affirming a state administrative agency decision holding the statutory guarantor petitioners personally liable for unpaid North Dakota Workers Compensation insurance premiums owed by a corporation) (annexed hereto as Exh. A, App. 9-10).

Although the instant case reached the Supreme Court of North Dakota procedurally by appeal from a decision filed December 11, 2001, by the North Dakota District Court, County of Grand Forks, Northeast Central Judicial District, under North Dakota law, the North Dakota Supreme Court reviews the decision of the administrative agency, here the North Dakota Workers Compensation Bureau, "rather than that of the District Court"[1].

The final decision of the North Dakota Workers Compensation Bureau, the state administrative agency from which subsequent judicial review occurred in the proceedings below, was rendered on June 26, 2001. See, Recommended Findings of Fact, Conclusions of Law and

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[1] See, e.g., *Ash v. Traynor*, 2000 ND 75, ¶ 4, 609 N.W.2d 96, 98 (N.D. 2000); and *Holmgren v. North Dakota Workers Compensation Bureau*, 455 N.W.2d 200, 201 (N.D. 1990).

Order of June 22, 2001, and final adoption by reference by the agency, on June 26, 2001, (all annexed hereto as Exh. D, App. 19-31).

JURISDICTION

The decision as to which the petitioners seek review was filed on December 20, 2002, by the Supreme Court of North Dakota. No petition for rehearing was filed relative to this decision, and pursuant to Rule 36 of the North Dakota Rules of Appellate Procedure, the filing of the opinion of the Supreme Court of North Dakota constitutes entry of judgment in a particular case. As such, the Court has jurisdiction to review the decision of the Supreme Court of North Dakota pursuant to 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

North Dakota Century Code § 65-04-26.1 provides:

> § 65-04-26.1. Corporate officer personal liability
>
> 1. An officer or director of a corporation, or manager or governor of a limited liability company, or employee of a corporation or limited liability company having twenty percent stock ownership who has control of or supervision over

the filing of and responsibility for filing premium reports or making payment of premiums or reimbursements under this title and who fails to file the reports or to make payments as required, is personally liable for premiums under this chapter and reimbursement under section 65-05-07.2, including interest, penalties, and costs if the corporation or limited liability company does not pay to the Bureau those amounts for which the corporation or limited liability company is liable.

2. The personal liability of any person as provided in this section survives dissolution, reorganization, bankruptcy, receivership, or assignment for the benefit of creditors. For the purposes of this section, all wages paid by the corporation or limited liability company must be considered earned from any person determined to be personally liable.

3. After review of the evidence in the employer's file, the Bureau shall determine personal liability under this section. The Bureau shall issue a decision under this section pursuant to section 65-04-32.

STATEMENT OF THE CASE

This case derives from a decision of a North Dakota state administrative agency, the North Dakota Workers Compensation Bureau, in which individual petitioners William Coutts, David C. Thompson, and Jack Geller were held to be personally liable as statutory guarantors for unpaid workers compensation premiums owed by the

North Dakota corporation, Grand Forks Professional Baseball, Inc.[2]

This North Dakota Workers Compensation Bureau decision purportedly was based upon N.D.C.C. § 65-04-26.1, despite the fact that this state agency first chose to commence a civil action back in 1998, against the *corporation*, Grand Forks Professional Baseball, Inc., for collection of those premiums, *with that agency admittedly having done absolutely nothing, in the intervening years, to prosecute that action, even up to the present day.*

By a Summons and Complaint dated August 18, 1998, served upon Grand Forks Professional Baseball, Inc., the North Dakota Workers Compensation Bureau first elected to pursue a judicial remedy, commencing a civil action against this corporate entity.[3] See, Summons and

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[2] The sole business of Grand Forks Professional Baseball, Inc., was the ownership and operation of a minor league professional baseball team known as the "Grand Forks Varmints", in the Prairie League, an independent professional minor league which had member franchises located in Grand Forks, ND; Bismarck, ND; Minot, ND; Brainerd, MN; Austin, MN; Aberdeen, SD; Brandon, Manitoba; Moose Jaw, Sask.; Saskatoon, Sask.; and Green Bay, WI. The Grand Forks Varmints played in the Prairie League only during the 1996 and 1997 baseball seasons, after which latter year, the league disbanded, and the team ceased operations.

[3] See, Rule 3 of the North Dakota Rules of Civil Procedure, which provides that "(a) civil action is commenced by the service of a summons", a rule which is distinct from its federal counterpart, which corresponding federal rule "requires the filing of a complaint with the court in order to commence an action." See, also the explanatory note accompanying Rule 3, N.D.R.Civ.P. As such, in North Dakota state court litigation, it is possible for a civil action to exist, including a served summons and complaint, with a responsively-served answer, without these pleadings having been filed, subject to the provisions of Rule

(Continued on following page)

Complaint, served in *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.* (annexed hereto as Exh. B, App. 12-16).

Significantly, this civil action remains pending today, although the North Dakota Workers Compensation Bureau, as the plaintiff in that action, has failed to prosecute it, with the case thus currently being subject to dismissal, should a corresponding motion to dismiss be made by defendant Grand Forks Professional Baseball, Inc., pursuant to Rule 41(b) of the North Dakota Rules of Civil Procedure.[4]

While an answer to the North Dakota Workers Compensation Bureau's complaint in this civil action was mail-served upon the Bureau on August 26, 1998, the Bureau has done nothing, whatsoever, to prosecute this-still pending civil action against Grand Forks Professional Baseball, Inc. in the years intervening since that time.[5]

4(c)(3), Rule 4(c)(4), and Rule 5(d) of the North Dakota Rules of Civil Procedure. See, also, footnote 4, *infra*.

[4] Pursuant to Rule 4(c)(3), N.D.R.Civ.P., where, as in the instance of the Bureau's served-but-as-yet-unfiled August 1998 summons and complaint, a defendant may "serve a written demand upon the plaintiff to file the complaint". Alternatively, under Rule 4(c)(4), N.D.R.Civ.P., defendant Grand Forks Professional Baseball, Inc. may, at any time it should choose, file the Bureau's "summons and complaint", with this defendant thereafter taxing the costs of such filing back to the plaintiff Bureau pursuant to Rule 54(e), N.D.R.Civ.P.

Having then caused the Bureau's summons and complaint and the Grand Forks Professional Baseball, Inc. answer to be filed with the court, this defendant may then proceed to move the court for dismissal of the Bureau's civil action **on its merits**. See, Rule 41(b), N.D.R.Civ.P.

[5] At the time of its commencement of this lawsuit, back in August of 1998, the Bureau was seeking to recover from Grand Forks

(Continued on following page)

(See, Answer, served in *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.*, Appendix C, App. 17-18).

In a decision entitled "Recommended Findings of Fact, Conclusions of Law and Order", an administrative law judge of the North Dakota Workers Compensation Bureau, addressed (among other arguments) the petitioners' position that the agency's administrative proceedings to impose personal liability upon petitioners William Coutts, Jack Geller, and David C. Thompson, as purported statutory guarantors for allegedly unpaid workers compensation premiums, was violative of these petitioners' rights under the Due Process Clause of the Fourteenth Amendment. Recommended Findings of Fact, Conclusions of Law

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Professional Baseball, Inc. "the total sum of $26,290.68." See, the complaint in *North Dakota Workers Compensation Bureau, supra,* (annexed hereto as Exh. B, App. 12-16) Significantly, the Bureau has failed to utilize the North Dakota Rules of Civil Procedure in any respect ***since the Bureau elected*** *in August of 1998 to pursue the remedy of collecting from the corporation unpaid workers compensation "premiums, penalties and interest" which, according to the Bureau's calculations, have increased in the time intervening between then and now, bringing the total amount owed to a figure of some $45,745.65. Indeed, the increase in accrued interest has occurred all while the North Dakota Workers Compensation Bureau has failed to file its summons and complaint pursuant to Rule 5(d), N.D.R.Civ.P., or indeed to prosecute this civil action at all, either through discovery, the filing of a note of issue, and ultimate trial, or, by filing a motion for summary judgment pursuant to Rule 56, N.D.R.Civ.P.*

Therefore, *after serving its amended summons and complaint* upon Grand Forks Professional Baseball, Inc. *back in August of 1998*, and having the defendant corporation's answer served upon it within the same month, *the North Dakota Workers Compensation Bureau has done absolutely nothing to diligently prosecute its claims in this civil action to an enforceable judgment against the corporation.*

and Order of North Dakota Workers Compensation Administrative Law Judge Allen C. Hoberg (annexed hereto as Exh. D, App. 19-31).

Although observing that, "***[p]erhaps if the action against [Grand Forks Professional Baseball, Inc.] were dismissed with prejudice, these three individuals could argue that the Bureau could not proceed against them for personal liability*** . . . ", the North Dakota Workers Compensation Bureau administrative law judge added, with respect to the petitioners' arguments under the Due Process Clause of the Fourteenth Amendment[6]:

> Thompson, Geller, and Coutts make a constitutional argument which they say precludes the application of N.D.C.C. § 65-04-26.1 as to them. The ALJ will assume constitutionality of N.D.C.C. § 65-04-26.1. The ALJ has no authority to rule on constitutional issues. *Johnson v. Elkin*, 263 N.W.2d 123 (N.D. 1978); *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580 (N.D. 1984).
>
> Recommended Findings of Fact, Conclusions of Law and Order (annexed hereto as Exh. D, App. 29-30).

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[6] Under a rule established by the North Dakota Supreme Court in *Johnson v. Elkin*, 263 N.W.2d 123, 126 (N.D. 1978), North Dakota state administrative agencies have been declared to be without authority to address constitutional issues of any kind, even where such issues are expressly raised by administrative litigants in adjudicatory proceedings before such agencies. See, also, *Ash v. Traynor,* 1998 ND 112, ¶ 3, 579 N.W.2d 180, 181-182 (N.D. 1998); *Service Oil, Inc. v. State*, 479 N.W.2d 815, 826 (N.D. 1992); and *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584 (N.D. 1984).

The petitioners thereafter sought judicial review of the decision of the North Dakota Workers Compensation Bureau, which consisted of the "Recommended Findings of Fact, Conclusions of Law and Order", of the Bureau administrative law judge, as such findings of fact, conclusions of law were wholly adopted by that state agency, as its final decision.

In the proceedings below before the Supreme Court of North Dakota, that court reviewed directly the decision of the North Dakota Workers Compensation Bureau, as the North Dakota Supreme Court has emphasized, "[i]n an appeal . . . involving the decision of an administrative agency, we review the decision of the agency, not the decision of the district court . . . ". *Ash v. Traynor*, 2000 ND 75, ¶ 4, 609 N.W.2d 96, 98 (N.D. 2000).

In its decision, relative to the federal constitutional Due Process argument made by individual petitioners, William Coutts, Jack Geller, and David C. Thompson, the Supreme Court of North Dakota stated as follows in the appellate proceedings below:

> Thompson, Geller, and Coutts argue the Bureau's attempt to hold them personally liable for the unpaid insurance premiums under *N.D.C.C. § 65-04-26.1(1)* violates due process and equal protection by denying them "their collective right to benefit from the res judicata and/or collateral estoppel effect of a dismissal with prejudice of the Bureau's civil action against the corporation, under failure to prosecute and/or laches grounds." The appellants have not cited any authority supporting the claim of a constitutional violation. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly

demonstrates that it contravenes the state or federal constitution. *Olson v. Bismarck Parks and Recreation Dist., 2002 ND 61, ¶ 11, 642 N.W.2d 864.* A party must "bring up the heavy artillery" when asserting a constitutional claim or forgo the claim entirely. *State v. Kensmoe, 2001 ND 190, P 19, 636 N.W.2d 183.*

The Bureau has not pursued its case against the corporation, because the Bureau believes that entity is now defunct and attempts at collection would be futile. Under *N.D.C.C. § 65-04-26.1(2)*, the personal liability of corporate officers and directors survives dissolution, reorganization, or bankruptcy of the corporation. The Bureau has statutory authority to assess personal liability for unpaid insurance premiums on the corporation's officers and directors, and there is no statutory requirement that the Bureau first attempt to settle its claim with the corporation. The appellants' argument that the Bureau's action to hold them personally liable for the unpaid insurance premiums violates their due process and equal protection rights is without merit.

VI

The Bureau's assessment of personal liability against Thompson, Geller, and Coutts for payment of unpaid worker's compensation premiums of Grand Forks Professional Baseball, Inc., is in accordance with the law. Accordingly, we affirm the decision of the district court upholding the Bureau's order imposing liability against these corporate officers and directors.

Exh. A, App. 9-10; 2002 ND 204, ¶¶ 17, 18 & 19, 654 N.W.2d at 431.

The current petition for *certiorari* follows.

ARGUMENT

INTRODUCTION

The instant petition for *certiorari* squarely presents to the Supreme Court the question of whether the substantive defenses of laches and *res judicata,* defenses available generally to civil litigation defendants under North Dakota state law, constitute property interests of such a dimension that the Due Process Clause of the Fourteenth Amendment grants constitutional protection to litigants in state administrative proceedings, so as to ensure that such administrative litigants have the opportunity to *assert and prosecute* those defenses in adjudicatory proceedings before a state administrative agency.

Although the Supreme Court has *implied* that *defenses* arising from substantive state law are included within those kinds of property interests which are protected by the Fourteenth Amendment's Due Process Clause, the Supreme Court has never directly addressed this issue in any case, much less one, such as the instant case, in which a state agency administrative litigant's right to at least *assert and prosecute* the defenses of laches and *res judicata,* has been specifically found to be a constitutionally-protected property right. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("the court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, ***either as defendants hoping to protect their property*** *or as plaintiffs attempting to redress grievances.*").

Indeed, the Supreme Court has recognized that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428 (1982). See, also, *Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. 306, 311-315 (1950).

In *Society Internationale v. Rogers*, 357 U.S. 197, 209 (1958), the Supreme Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits. . . . " *Id.* at 209.

Similarly, the Supreme Court held that the Fourth Amendment's Due Process Clause prevented the states from denying potential litigants use of established adjudicatory procedures, when such an action would be " 'the equivalent of denying them an opportunity to be heard upon their claimed [rights].' " See, *Logan v. Zimmerman Brush Co.*, *supra*, 455 U.S. at 429-430, citing *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Correspondingly as well, the Supreme Court observed in *Martinez v. California*, 444 U.S. 277, 281-282 & n.5 (1980), that arguably, a state law tort claim is a "species of 'property' protected by the Due Process Clause." *Id.* at 281-282. See, also, *Logan v. Zimmerman Brush Co., supra,* 455 U.S. at 429, n.4.

Because of the strong suggestion in *Logan v. Zimmerman Brush Co., supra,* to the effect that *defenses,* available generally under state law, for "defendants hoping to protect their property", are *themselves* property interests which are protectible under the Due Process Clauses

of the Fifth and Fourteenth Amendments, it is respectfully submitted that the Supreme Court should take the currently-presented opportunity to directly address this question in the instant case.

POINT 1

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA WRONGFULLY DEPRIVED THE PETITIONERS OF THEIR PROTECTED PROPERTY INTERESTS IN ASSERTING AND LITIGATING (IN STATE ADMINISTRATIVE AGENCY ADJUDICATORY PROCEEDINGS) THE DEFENSES OF LACHES AND *RES JUDICATA*, DEFENSES WHICH, IF SUCCESSFUL UPON THEIR MERITS, WOULD HAVE EXONERATED THE PETITIONERS FROM ANY FINANCIAL LIABILITY, AS PURPORTED STATUTORY GUARANTORS, TO THE NORTH DAKOTA WORKERS COMPENSATION BUREAU, THE STATE AGENCY INVOLVED HEREIN.

A. The Due Process Clause of the Fourteenth Amendment protects civil litigation defendants by affording them federal constitutional protection, relative to their assertion and prosecution of legitimate and meritorious defenses regularly available under state law such as, in the instant case, the defenses of laches and *res judicata*.

As the Supreme Court emphasized in *Logan v. Zimmerman Brush Co., supra,* 455 U.S. at 429-430:

> The Court traditionally has held that **the Due Process Clauses protect civil litigants who**

> **seek recourse in the courts, *either as defendants hoping to protect their property* or as plaintiffs attempting to redress grievances**
> . . .
>
> Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed [rights]." *Boddie v. Connecticut, 401 U.S. 371, 380 (1971). (emphasis added).*
>
> 455 U.S. at 429-430.

In this sense, the Supreme Court has held that civil causes of action, including defenses interposed in such actions, to be a species of property protected by the Due Process Clause of the Fourteenth Amendment. See, e.g., *Logan v. Zimmerman Brush Co., supra,* 455 U.S. at 429-430, citing *Mullane v. Central Hannover Bank & Trust Co., supra,* 339 U.S. at 313. Additionally, the Supreme Court has made clear that interference with the right of a defendant to prosecute a *defense* amounts to a deprivation of property violative of the Due Process Clauses of the Fourteenth and Fifth Amendments. See, e.g., *Martinez v. California, supra,* 444 U.S. at 282 & n.5.

In the instant case, the specific defenses which the petitioners herein attempted to assert and prosecute in their *defense* in the North Dakota Workers Compensation Bureau proceedings below were the defenses of laches and

res judicata.[7] As explained above, these defenses factually derive from the North Dakota state court civil action

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[7] The defense of laches was affirmatively pled by petitioner Grand Forks Professional Baseball, Inc. in this North Dakota corporation's Answer served in the parallel North Dakota state court civil action in *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.* (annexed hereto as Exh. C, App. 17-18.) ***It has long been established in North Dakota decisional law that laches in pursuing legal remedies against a principal/debtor operates to exonerate the guarantor***. See, N.D.C.C. § 22-01-15 and *Roberts Thropp & Co. v. A.H. Laughlin*, 4 N.D. 167, 173-174, 59 N.W. 967, 970 (N.D. 1894). Additionally, the petitioners' asserted defense of *res judicata* derives from the fact that in that North Dakota state court civil action, the plaintiff therein, the North Dakota Workers Compensation Bureau, has done nothing, whatsoever, to prosecute that action ever since the Bureau commenced it in August of 1998. Under the express language of Rule 41(b) of the North Dakota Rules of Civil Procedure, a civil action is presumed to be subject to dismissal ***with prejudice***, unless otherwise provided. Additionally, it is well established that a court has inherent authority to dismiss a civil action, ***with prejudice***, either upon motion by a defendant, or *sua sponte*. See, e.g., *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-631 (1962). At best, individual petitioners William Coutts, Jack Geller, and David C. Thompson are putative statutory guarantors, relative to unpaid premiums due to the North Dakota Workers Compensation Bureau. See, N.D.C.C. § 65-04-26.1(1). ***As putative statutory guarantors, individual petitioners William Coutts, Jack Geller, and David C. Thompson should have the same ability to assert the same defenses as have been, or could be, asserted by the employer principal in this case, the North Dakota corporation Grand Forks Professional Baseball, Inc.*** See, e.g., *Otte v. Langley's Lawn Care, Inc.*, 66 S.W.3d 64, 72 (Mo. App. 2001) (As a statutory guarantor, said guarantor possessed the same defenses as did the principal/employer corporation, including the defense of statute of limitations.) ***Therefore, should the claims of plaintiff North Dakota Workers Compensation Bureau against defendant principal/debtor Grand Forks Professional Baseball, Inc. be dismissed with prejudice, on their merits, as a result of the failure by the Bureau to prosecute its 1998 civil action, putative statutory guarantor petitioners William Coutts, Jack Geller, and David C.***

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which the North Dakota Workers Compensation Bureau elected to pursue to recover unpaid workers compensation premiums from the North Dakota corporation Grand Forks Professional Baseball, Inc., *almost five years ago*.

The North Dakota Workers Compensation Bureau commenced this civil action by service of a summons and complaint dated August 18, 1998, upon Grand Forks Professional Baseball, Inc. (See, Summons and Complaint, annexed hereto as Exh. B., App. 12-16).[8] Defendant Grand Forks Professional Baseball, Inc. served an Answer on August 26, 1998, but, as stated above, the Bureau has done nothing, whatsoever, to prosecute this still-pending civil action ever since that time, almost five years ago.

Significantly, this yet-pending civil action is, right now, subject to dismissal ***with prejudice and upon its merits,*** on failure-to-prosecute grounds, whenever a motion should be made to that effect by defendant Grand Forks Professional Baseball, Inc., pursuant to Rule 41(b), N.D.R.Civ.P.[9], or even *sua sponte* by the North Dakota

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Thompson would be exonerated from liability for the unpaid workers compensation premiums involved.

[8] Although the Bureau has never bothered to file its summons and complaint with the captioned North Dakota District Court in Grand Forks County, defendant Grand Forks Professional Baseball, Inc. has that option yet today pursuant to Rule 4(c)(3), and (4), N.D.R.Civ.P. See, also, footnotes 3 & 4, *supra*.

[9] Under this rule, an order dismissing a case for a failure to prosecute is *presumed* to be a dismissal *with prejudice and upon the merits*, as the express language of Rule 41(b), N.D.R.Civ.P., provides that such an order for dismissal, "operates as an adjudication on the merits", unless the court in its order for dismissal "otherwise provides."

district court. See, e.g., *Link v. Wabash Railroad, Co.*, 370 U.S. 629-631 (1962).

Additionally, NDCC §65-04-26.1(1) provides, in pertinent part, that at best, unpaid premium personal liability of officers or directors of corporations only attaches **"*if* the corporation ... does not pay to the Bureau those amounts for which the corporation ... is liable."** (emphasis added). As such, this statute, at best, causes individual petitioners William Coutts, Jack Geller, and David C. Thompson to be, under the facts of the instant case, *putative* statutory guarantors, relative to unpaid premiums due to the North Dakota Workers Compensation Bureau by the employer/principal/debtor, the North Dakota corporation Grand Forks Professional Baseball, Inc.

As putative statutory guarantors, individual petitioners William Coutts, Jack Geller, and David C. Thompson should have the same ability to assert the same defenses as have been, or could be, asserted by the employer/principal/debtor, the North Dakota corporation Grand Forks Professional Baseball, Inc. See, e.g., *Otte v. Langley's Lawn Care, Inc.*, 66 S.W.3d 64, 72 (Mo. App. 2001) (*An appellate decision in a workers compensation setting holding that a statutory guarantor possessed the same defenses as did the principal/employer corporation, including the defense of statute of limitations.*)

Unquestionably, back in August of 1998, the North Dakota Workers Compensation Bureau ***made an election*** to pursue a remedy in North Dakota state court proceedings to collect allegedly unpaid and owing premiums from Grand Forks Professional Baseball, Inc., the corporate entity. As explained above, the North Dakota Workers

Compensation Bureau acknowledges that it has done nothing to prosecute this case and pursue the judicial remedy which it chose.

It is beyond clear that the Bureau has, by virtue of its failure to prosecute its 1998 civil action, failed to avail itself of its litigation rights under the North Dakota Rules of Civil Procedure, and the substantive aspects of North Dakota law as well, while failing to conduct discovery, failing to even *file its* summons and complaint, let alone a note of issue, and failing to pursue summary judgment pursuant to Rule 56, N.D.R.Civ.P.

Rule 41(b) of the North Dakota Rules of Civil Procedure "is identical to Fed.R.Civ.P. 41(b), except for style changes and minor changes to conform to state practice". See, the Explanatory Note which accompanies Rule 41, N.D.R.Civ.P.

Under Federal Rule of Civil Procedure 41(b), a district court unquestionably has the power and discretion to dismiss a case with prejudice for want of prosecution either upon a motion made by a defendant pursuant to Rule 41(b) or *sua sponte*. See, e.g., *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-631 (1962). This power is necessary to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of prejudice to a defendant. *See id.* at 629-630.

It is well established within the context of Rule 41(b), "'[t]he failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure.'" *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651 (9th Cir. 1991). See, also, e.g., *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2nd Cir. 1982) (prejudice to a

defendant may be presumed from a failure by a plaintiff to diligently prosecute); *West v. City of New York*, 130 F.R.D. 522, 524 (S.D.N.Y. 1990) (It is the plaintiff's obligation to move an action forward, and failure to do so may result in dismissal with prejudice); and *Link v. Wabash Railroad Co., supra*, 370 U.S. at 629-631.

Clearly, in the instant case, because of the original election by the North Dakota Workers Compensation Bureau to commence, **but to completely fail to prosecute,** a civil action against Grand Forks Professional Baseball, Inc., this action is, even today, subject to dismissal under Rule 41(b), N.D.R.Civ.P., with prejudice and upon its merits.

Correspondingly, such a dismissal of the Bureau's civil action to collect unpaid workers compensation premiums from the corporation Grand Forks Professional Baseball, Inc., with prejudice and upon its merits, would ***preclude*** any collection of such premiums from the individual petitioners. See, the discussion and authorities set forth in footnote 7, *supra*.

Given the posture of the civil action, commenced back in August of 1998 by the North Dakota Workers Compensation Bureau against the corporation, Grand Forks Professional Baseball, Inc., now being subject to dismissal, with prejudice and upon its merits, because of the failure by the Bureau to prosecute this action, the individual petitioners herein, William Coutts, Jack Geller, and David C. Thompson possessed property interests in their assertion and prosecution of the defenses of laches and failure to prosecute, by virtue of their relationship to the defendant in that unprosecuted civil action, the corporation

Grand Forks Professional Baseball, Inc. See, the discussion and authorities set forth in footnote 7, *supra*.

Of course, as the Supreme Court noted in *Logan v. Zimmerman Brush Company, supra*, within the context of a claimed deprivation of a property interest protected by the Due Process Clause, courts are faced with "'what has become ***a familiar two-part inquiry: we must determine whether (the party) was deprived of a protected property interest, and, if so, what process was (that party) due***.'" *Logan v. Zimmerman Brush Company, supra*, 422 U.S. at 428, citing *Mullane v. Central Hannover Bank & Trust Co.*, 339 U.S. at 311-313.

In the instant case, as the petitioners herein argued to the Supreme Court of North Dakota in the proceedings below, the "process" to which these individual petitioners were "due", was simply a suspension or stay of the North Dakota Workers Compensation administrative proceedings, pending the final adjudication of the 1998 North Dakota state court civil action of *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.*

Certainly, once the available defenses of failure to prosecute and laches have been litigated, upon their merits, in the North Dakota state district court in *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.* individual petitioners, William Coutts, Jack Geller, and David C. Thompson will have had vindication of their property interests in their assertion and prosecution of the defenses of failure to prosecute and laches. In the event that the North Dakota state district court should dismiss that action, with prejudice and upon its merits, under either or both of these defenses, for those

reasons set forth above, individual petitioners, William Coutts, Jack Geller, and David C. Thompson, will be exonerated from any responsibility as putative statutory guarantors for unpaid premiums which are no longer owing by the principal/employer/debtor corporation Grand Forks Professional Baseball, Inc. See, the discussion on authorities set forth in footnote 7, *supra*.

Conversely, in the event that these defenses, once having been subject to adjudication in the North Dakota state court proceedings of *North Dakota Workers Compensation Bureau v. Grand Forks Professional Baseball, Inc.*, should be ultimately unsuccessful, the petitioners' property interests in these defenses, and those rights deriving therefrom under the Due Process Clause of the Fourteenth Amendment, shall have been vindicated completely as well.

Reduced to the essentials, simply upon a suspension or stay of the administrative proceedings within the North Dakota Workers Compensation Bureau pursuant to N.D.C.C. § 65-04-26.1, all "process" to which the individual petitioners herein are "due", shall have been provided. *Logan v. Zimmerman Brush Co., supra*, 455 U.S. at 428.

CONCLUSION

For the foregoing reasons, the petitioners herein respectfully pray that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

DAVID C. THOMPSON, P.C.
DAVID C. THOMPSON
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Telephone: (701) 775-7012
Attorney for Petitioners

Dated: March 19, 2003

APPENDIX "A"

Grand Forks Professional Baseball, Inc., a North Dakota Corporation; David C. Thompson, individually; William Coutts, individually; and Jack Geller, individually, Appellants v. North Dakota Workers Compensation Bureau, Appellee

No. 20020093

SUPREME COURT OF NORTH DAKOTA

2002 ND 204; 654 N.W.2d 426

December 20, 2002, Filed

PRIOR HISTORY:

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Debbie Gordon Kleven, Judge.

DISPOSITION:

Affirmed.

COUNSEL:

David C. Thompson (argued) and Emilee O. Harren (on brief), third-year law student, under the Rule on Limited Practice of Law by Law Students, David C. Thompson, P.C., Grand Forks, N.D., for appellants.

Lawrence E. King (argued), Special Assistant Attorney General, and Lawrence A. Dopson (on brief), Special Assistant Attorney General, Bismarck, N.D., for appellee.

JUDGES:

Opinion of the Court by Dale V. Sandstrom, Justice. William A. Neumann Mary Muehlen Maring Carol Ronning Kapsner Gerald W. VandeWalle, C.J.

OPINION BY:

Dale V. Sandstrom

OPINION:

Sandstrom, Justice.

David Thompson, Jack Geller, and William Coutts, corporate directors and officers of Grand Forks Professional Baseball, Inc., appealed from a judgment of the district court affirming an order of the North Dakota Workers Compensation Bureau holding them personally liable for unpaid corporate worker's compensation insurance premiums. We affirm, concluding the Bureau's assessment of liability against these individuals is in accordance with the law.

I

Grand Forks Professional Baseball, Inc., was incorporated in September 1995 to acquire and manage a minor league baseball team. The team operated during 1996 and 1997 and was then disbanded.

Initially, Kenneth Leip was the president and sole owner of the corporation. However, he divested his interest in the corporation in April 1996. At that time, Geller acquired a 17.10% interest, Thompson a 16.06% interest, and Coutts a 5.18% interest in the corporation. By September

1996, these individuals were officers and directors of the corporation.

The corporation failed to make timely payment of its worker's compensation insurance premiums. The Bureau determined that for the years 1996 and 1997 the corporation owed $34,177.83, with interest and penalties. In August 1998, the Bureau instituted a collection action against the corporation for the unpaid premiums. The Bureau has not, however, pursued that lawsuit, because the corporation ceased functions and is apparently insolvent.

On August 18, 2000, the Bureau issued corporate officer liability orders against Thompson, Geller, and Coutts to collect the unpaid premiums from them. They requested reconsideration, and a formal hearing was held on the Bureau's assessment. The Bureau entered a final order on June 26, 2001, assessing liability for the unpaid premiums against these individuals, and they appealed to the district court. After a hearing, the court entered a judgment upholding the Bureau's order.

The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. §§ 27-05-06, 65-10-01, and 28-32-42. The appeal to this Court is timely under N.D.R.App.P. 4(a) and N.D.C.C. § 28-32-49. This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 28-32-49.

II

The appellants do not dispute that they were officers and directors of Grand Forks Professional Baseball, Inc., during the relevant period, that the corporation was

obligated to pay worker's compensation insurance premiums, or that the Bureau correctly calculated the amount of premiums due. Rather, the appellants argue they are not by statute personally liable for the unpaid corporate premiums, because none of them has a 20% ownership share in the corporation. They argue the Bureau's action against the corporation constituted an election of remedies, precluding the Bureau from suing individual corporate officers or directors. They also argue the Bureau's attempt to hold them personally liable without completing the corporate collection action violated their constitutional right to due process and equal protection.

Under N.D.C.C. § 28-32-19,[1] the district court must affirm the order of the agency unless it finds any of the following:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

---

[1] We note N.D.C.C. § 28-32-46 adds additional grounds for not affirming an administrative agency decision, effective August 1, 2001. However, the appeal from the Bureau's decision was filed on July 26, 2001. Therefore, former N.D.C.C. § 28-32-19 applies. *See Henderson v. Dir., North Dakota Dep't of Transp.*, 2002 ND 44, p 6 n. 2, 640 N.W.2d 714.

> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact. On appeal, this Court under N.D.C.C. § 28-32-21 reviews the judgment of the district court in the same manner.[2] Questions of law, including the interpretation of a statute, are fully reviewable on appeal from a Bureau decision. *Paul v. North Dakota Workers Comp. Bureau,* 2002 ND 96, p 6, 644 N.W.2d 884.

III

Thompson, Geller, and Coutts contend a corporate officer or director cannot be held personally liable for a corporation's unpaid worker's compensation premiums under N.D.C.C. § 65-04-26.1(1), unless that individual owns at least 20% of the corporate stock. The statute provides:

> An officer or director of a corporation, or manager or governor of a limited liability company, or employee of a corporation or limited liability company having twenty percent stock ownership who has control of or supervision over the filing of and responsibility for filing premium reports or making payment of premiums or reimbursements under this title and who fails to file the

[2] We note, this statute has been recodified under N.D.C.C. § 28-32-49, effective August 1, 2001. The prior version of the statute applies because the appeal from the Bureau's decision was filed on July 26, 2001.

> reports or to make payments as required, is personally liable for premiums under this chapter and reimbursement under section 65-05-07.2, including interest, penalties, and costs if the corporation or limited liability company does not pay to the bureau those amounts for which the corporation or limited liability company is liable.
>
> The Bureau argues, and the district court found, this statute is unambiguous and imposes liability upon a corporate officer or director for unpaid premiums irrespective of whether that individual owns corporate stock.

Interpretation of a statute is a question of law fully reviewable by this Court. *Svedberg v. North Dakota Workers Comp. Bureau,* 1999 ND 181, p 8, 599 N.W.2d 323. Words used in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. If a statute is clear and unambiguous, we do not disregard the letter of the statute under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05.

Relevant to this issue, we conclude the statute is unambiguous. The subject entities of the statute are separated by commas, and the coordinating conjunction "or" is used for "introducing an alternative." Webster's New World Dictionary 999 (2d College Ed. 1978). The phrase "having twenty percent stock ownership" is descriptive of the subject "employee of a corporation or limited liability company," and, by comma placement, clearly is not descriptive of or applicable to the subject "officer or director of a corporation." The statute, therefore, imposes personal liability for unpaid premiums upon officers or directors of a corporation irrespective of their

ownership interest in the corporation. It also, however, imposes liability upon an employee of a corporation only if that employee has a 20% stock ownership and has control of or supervision over the filing of premium reports or making payment of premiums and fails to do so.

Although not necessary to resolution of this issue, the legislative history also demonstrates the appellants' interpretation is without merit. Prior to the amendment of the statute in 1995, personal liability for insurance premiums was generally imposed only against corporate officers and directors who had at least a 20% equity share in the corporation. *See Raboin*, 1997 ND 221, p 6, 571 N.W.2d 833. At that time the statute provided:

> Any officer, director, or any employee having twenty percent ownership of a corporation . . . is personally liable for premiums or reimbursement, including interest, penalties, and costs in the event the corporation . . . does not pay to the bureau those amounts for which the employer is liable.

N.D.C.C. § 65-04-26.1(1).

In 1995, the statute was amended to allow the Bureau to hold all corporate officers and directors personally liable for unpaid insurance premiums, irrespective of their stock ownership. The amendments were included in House Bill 1329, and Assistant Attorney General Robert W. Morris, counsel for the Bureau, testified before both the House and the Senate Industry, Business & Labor Committees:

> This section of the Bill proposes to make several changes to the present corporate officer liability provisions of the Workers Compensation Act. . . .

> First, the Bill proposes to clarify and broaden the officers that may be held personally liable. At the present time, it is unclear from the law whether liability may be imposed upon any officer plus any employee owning over twenty percent of the stock or whether an officer must own twenty percent of the stock to be liable. The Bill proposes to amend the language of the law to clarify that the former is true. Under House Bill 1329, any officer, regardless of stock ownership, plus any employee with a twenty percent ownership interest may be held personally liable.

We hold that, under N.D.C.C. § 65-04-26.1(1), an officer or director of a corporation can be held personally liable for unpaid worker's compensation insurance premiums, irrespective of whether that individual has an ownership interest in the corporation.

IV

Thompson, Geller, and Coutts argue that the Bureau's commencement of and failure to prosecute a collection action against the corporation for the unpaid insurance premiums constituted an election of remedies precluding the Bureau from holding them personally liable for the unpaid premiums.

The doctrine of election of remedies is applied when three elements are present: (1) the existence of two or more remedies; (2) inconsistency between the remedies; and (3) the choice of one remedy. *Farmers Elevator & Mercantile Co. v. Farm Builders, Inc.*, 432 N.W.2d 864, 870 (N.D. 1988). A trial court does not abuse its discretion by postponing the election of remedies until final judgment is entered. *Id.* Under the doctrine, a plaintiff is only required

to elect between two remedies when those remedies are inconsistent. *Barker v. Ness,* 1998 ND 223, p 9, 587 N.W.2d 183.

The Bureau has authority under N.D.C.C. § 65-04-24 to sue an employer for unpaid premiums and also has authority to impose personal liability against corporate directors or officers under N.D.C.C. § 65-04-26.1(1). These remedies are neither exclusive nor inconsistent. If the worker's compensation insurance premium remains unpaid, the Bureau can seek under these statutes payment from the employer and can also seek payment from individual corporate officers and directors. The appellants have not cited persuasive authority to support their position that the Bureau's initiation of an action against the corporation precludes the Bureau from seeking payment of the unpaid premiums from the individual corporate officers and directors. We conclude their election of remedies issue is without merit.

V

Thompson, Geller, and Coutts argue the Bureau's attempt to hold them personally liable for the unpaid insurance premiums under N.D.C.C. § 65-04-26.1(1) violates due process and equal protection by denying them "their collective right to benefit from the res judicata and/or collateral estoppel effect of a dismissal with prejudice of the bureau's civil action against the corporation, under failure to prosecute and/or laches grounds." The appellants have not cited any authority supporting the claim of a constitutional violation. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the

statute clearly demonstrates that it contravenes the state or federal constitution. *Olson v. Bismarck Parks and Recreation Dist.,* 2002 ND 61, p 11, 642 N.W.2d 864. A party must "bring up the heavy artillery" when asserting a constitutional claim or forgo the claim entirely. *State v. Kensmoe,* 2001 ND 190, p 19, 636 N.W.2d 183.

The Bureau has not pursued its case against the corporation, because the Bureau believes that entity is now defunct and attempts at collection would be futile. Under N.D.C.C. § 65-04-26.1(2), the personal liability of corporate officers and directors survives dissolution, reorganization, or bankruptcy of the corporation. The Bureau has statutory authority to assess personal liability for unpaid insurance premiums on the corporation's officers and directors, and there is no statutory requirement that the Bureau first attempt to settle its claim with the corporation. The appellants' argument that the Bureau's action to hold them personally liable for the unpaid insurance premiums violates their due process and equal protection rights is without merit.

VI

The Bureau's assessment of personal liability against Thompson, Geller, and Coutts for payment of unpaid worker's compensation premiums of Grand Forks Professional Baseball, Inc., is in accordance with the law. Accordingly, we affirm the decision of the district court upholding the Bureau's order imposing liability against these corporate officers and directors.

Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring

Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

APPENDIX "B"

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF GRAND FORKS	
State of North Dakota by the Workers Compensation Bureau, Plaintiff, v. Grand Forks Professional Baseball, Inc., a Corporation, Defendant.	**AMENDED SUMMONS** Employer Account No. 119767 2

THE STATE OF NORTH DAKOTA TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to appear and defend against the attached complaint which is herewith served upon you, by serving upon the plaintiff an answer within twenty (20) days after the service of this summons upon you, exclusive of the date of service. If you fail to serve an answer, judgment by default will be taken against you for the relief demanded in the complaint.

Dated this 10th day of August, 1998.

BY: /s/ Daniel L. Rouse
Daniel L. Rouse
Special Assistant Attorney General
State Bar ID No. 04704
Workers Compensation Bureau
500 East Front Avenue
Bismarck, North Dakota 58504
(701) 328-3811

Attorney for Plaintiff

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF GRAND FORKS	
State of North Dakota by the Workers Compensation Bureau, Plaintiff, v. Grand Forks Professional Baseball, Inc., a Corporation, Defendant.	**AMENDED COMPLAINT** Employer Account No. 119767 2

The plaintiff for its cause of action alleges the following:

COUNT I.

I.

This action is brought in accordance with the provisions of Chapter 65-04, North Dakota Century Code, by the state of North Dakota for and on behalf of the Workers Compensation Bureau. The Bureau is and was at all times herein mentioned duly created, organized, and existing under and by virtue of Title 65, North Dakota Century Code.

II.

The defendant, an employer, engaged employees in hazardous employment in the state of North Dakota, and

is subject to the provisions of Chapter 65-04, North Dakota Century Code.

III.

The business address of the defendant is Box 5303, Grand Forks, North Dakota.

IV.

The defendant filed final payroll reports with the plaintiff for the insurance periods hereafter referenced. Based upon the payroll reports defendant filed with plaintiff, for the period from April 1, 1997, through September 16, 1997, plaintiff assessed an actual premium due of $12,175.41. For past due premium and penalty for the periods from April 1, 1997, through September 16, 1997, defendant owes $25,776.32, giving a balance of $37,951.73. For the period April 1, 1997, through September 16, 1997 defendant has on account a credit because he had prepaid premium in the sum of $15,212.17, leaving a balance due of $22,739.56.

V.

In addition to the premiums due, penalties were assessed for premium due during the period April 1, 1997, through September 16, 1997, as provided in Section 65-04-23, North Dakota Century Code, in the amount of $3,551.12 and these are due and payable.

VI.

That penalties will continue to accrue pursuant to the terms of N.D.C.C. § 65-04-23 until judgment is entered, at two percent (2%) of the amount in default for each month or fraction of a month the obligation remains unpaid.

VII.

The plaintiff has demanded payment from the defendant for the workers compensation premium and penalties it is owed and the defendant has failed to pay these obligations.

COUNT II.

I.

The plaintiff restates and realleges all matters in paragraphs I through VII and incorporates them by reference.

II.

That in accordance with Section 65-04-27.1(1)(b) of the North Dakota Century Code, it is unlawful for an employer to engage employees in hazardous employment in the state of North Dakota when that employer is in default of his workers compensation insurance premium, and such unlawful employment may be prohibited by an injunction against the employer.

WHEREFORE, plaintiff prays as follows:

1. That plaintiff receive judgment against defendant for the total sum of $26,290.68 in premium(s), penalties, and interest.

2. That, on a final hearing, defendant, his agents, and his employees may be permanently enjoined from the employment of employees in hazardous employment within the state of North Dakota, until the defendant has fully complied with the North Dakota Workers Compensation Act.

3. That plaintiff receive costs and expenses incurred herein.

4. That plaintiff receive such other additional relief as the Court deems just and equitable.

Dated this 10th day of August, 1998.

BY: /s/ Daniel L. Rouse
Daniel L. Rouse
Special Assistant Attorney General
State Bar ID No. 04704
Workers Compensation Bureau
500 East Front Avenue
Bismarck, North Dakota 58504
(701) 328-3811

Attorney for Plaintiff

APPENDIX "C"

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF GRAND FORKS	NORTHEAST CENTRAL JUDICIAL DISTRICT

State of North Dakota by the Workers Compensation Bureau,
Plaintiff,
vs.
Grand Forks Professional Baseball, Inc., a Corporation,
Defendant

ANSWER

COMES NOW defendant Grand Forks Professional Baseball, Inc., for its Answer to the Plaintiff's Complaint, hereby stating and averring as follows:

I.

Defendant Grand Forks Professional Baseball, Inc. is presently without sufficient information to admit or deny paragraphs IV and V of the Complaint, but admits that Grand Forks Professional Baseball, Inc. is a North Dakota corporation which has a business address of Box 5303, Grand Forks, North Dakota.

II.

Defendant Grand Forks Professional Baseball, Inc. denies that it owes the plaintiff "the total sum of $26,290.68 in premium(s), penalties, and interest".

III.

The defendant further states that the instant action is barred by application of the doctrine of laches and/or the failure of the plaintiff to comply with the provisions of N.D.C.C. § 65-04-24.

Dated this 26th day of August, 1998.

/s/ David C. Thompson
David C. Thompson,
ND ID No.: 3921
DAVID C. THOMPSON, P.C.
321 Kittson Avenue
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(701) 775-7012
(701) 775-2520 (Fax)
Attorney for Defendant Grand Forks Professional Baseball, Inc.

APPENDIX "D"

STATE OF NORTH DAKOTA

WORKERS COMPENSATION BUREAU

IN THE MATTER OF THE ACCOUNT OF: Grand Forks Professional Baseball, Inc. a Corporation, and David C. Thompson, Individually, William Coutts, Individually, and Jack Geller, Individually	**RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** Employer Account No. 1197 672

On October 23, 2000, the Office of Administrative Hearings received a request from the Workers Compensation Bureau ("Bureau") to provide an administrative law judge ("ALJ") to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to this matter. On October 24, 2000, the undersigned ALJ was designated.

This matter results from three separate Corporate Liability Orders issued by the Bureau. On August 18, 2000, the Bureau issued three separate Corporate Liability Orders ordering David Thompson, Jack Geller, and William Coutts each to individually pay to the Bureau $30,345.62 plus interest, under the provisions of N.D.C.C. §§ 65-04-26.1 and 65-05-07.2. The Bureau sought by the issuance of these three orders to impose individual liability against each of these three individuals for unpaid workers compensation premium owed by Grand Forks Professional Baseball, Inc. ("GFPB") for the period from

April 1, 1996, through September 16, 1997, plus penalties and interests, plus reimbursements.

On September 13, 2000, David Thompson, who is an attorney licensed to practice in North Dakota, on his own behalf and on behalf of the other two individuals, as well as on behalf of GFPB, filed a Petition and Request for Reconsideration and Rehearing by the Bureau pursuant [to] N.D.C.C. § 65-04-26.1(3). On October 20, 2000, The Bureau filed a Response to Petition. Both the September 13 Petition and Request and the October 20, 2000, Response to Petition consolidated the three individual matters. The Bureau sent the request for an ALJ to the Office of Administrative Hearings as one consolidated matter, consolidating all three individual matters for the purpose of holding one hearing and issuing one decision.

On October 27, 2000, the designated ALJ issued a Notice of Prehearing Conference scheduling a December 14, 2000, prehearing conference. The prehearing conference was held as scheduled, via telephone. Special Assistant Attorney General Anne Jorgenson Green represented the Bureau. David Thompson represented himself, individually, as well as GFPB, the corporate entity, and Jack Geller and William Coutts, individually. *See* December 14, 2000, First Prehearing Conference Summary (letter).

On January 29, Ms. Green notified the ALJ that Special Assistant Attorney General Lawrence King would henceforth represent the Bureau in this matter.

On January 31, 2001, the ALJ issued a Notice of Second Prehearing Conference scheduling another prehearing conference for February 14, 2001. The second prehearing conference was held as scheduled. Mr. Thompson again was present representing the same individuals

and entity. Mr. King represented the Bureau. *See* February 14, 2001, Second Prehearing Conference Summary and Notice of Third Prehearing Conference (letter). At that same time the ALJ also scheduled a third prehearing conference which was set for March 14, 2001. The parties had already agreed to a hearing date at the second prehearing conference.

On March 21, 2001, the ALJ issued a Notice of Hearing and Prehearing Summary (summarizing the third prehearing conference). The notice scheduled the hearing for April 17, 2001, (the same date as earlier agreed upon by the parties). Attached was a Specification of Issues which specified issues that the ALJ had taken from Mr. Thompson's earlier Petition and Request and from prehearing conference discussions. On March 27, 2001, Mr. King wrote to the ALJ with concerns about the Specification of Issues.

At an earlier prehearing conference the parties agreed that perhaps a stipulation of facts or partial stipulation of facts could be reached to avoid the need for a hearing or to facilitate a shorter hearing. On April 4, 2001, Mr., King wrote to the ALJ stating that no stipulation of facts had been reached and a hearing was necessary.

On April 11, 2001, the ALJ issued a Notice of Rescheduled Hearing rescheduling the hearing as to location only (changing it to a different building in Grand Forks to accommodate a possible telephone witness).

The hearing was held as scheduled on April 17, 2001, at the Grand Forks District Courthouse, Grand Forks, ND beginning at 9:00 a.m. Mr. King represented the Bureau. Mr. Thompson represented the same individuals and entity. Mr. Coutts was present but Mr. Geller was not. Mr.

King called on Mr. Coutts as a witness. Neither Mr. King nor Mr. Thompson called any witnesses via telephone. Mr. King offered exhibits B1-B40, all of which were admitted. Mr. Thompson called no other witnesses. He offered exhibits R1-R3, R2 and R3 were admitted. R1 was a duplicate of a Bureau exhibit and was not admitted. Also, Mr. Thompson asked the ALJ to take official notice of 1995 N.D. Sess. Laws, ch. 619 and the legislative history of that provision, as well as the North Dakota Supreme Court case of *Raboin v. N.D.W.C.B.*, 571 N.W. 2d 833 (N.D. 1997) (a courtesy copy of that 1997 case was provided to the ALJ). The ALJ took official notice of the Raboin case and the 1995 legislation with its legislative history. Exhibit B41 was submitted and admitted by Mr. King under agreement with Mr. Thompson after the hearing, as a delayed exhibit.

Following the evidentiary portion of the hearing the ALJ set a briefing schedule. The Bureau filed the North Dakota Workers Compensation Bureau's Post-Hearing Brief on May 7, 2001. Mr. Thompson filed the Post-Hearing Memorandum of Petitioners David C. Thompson, William Coutts and Jack Geller, on June 1, 2001. The Bureau filed the North Dakota Workers Compensation Bureau's Post-Hearing Reply Brief on June 11, 2001.

The issues for this matter are as stated in the Specification of Issues. However, the ALJ recognizes that the Bureau does not agree that the issues are exactly as stated by the ALJ. *See* Mr. King's March 27, 2001, letter. Essentially, the overriding issue in this matter is whether any or all of the three individuals (Mr. Thompson, Mr. Coutts, and Mr. Geller) are personally liable for the unpaid Workers Compensation premiums of GFPB for the period in question, under the provisions of N.D.C.C. § 65-04-26.1.

There may be tangential issues (*e.g.*, whether specific judicial action by the Bureau is a bar to this administrative action, and whether there are constitutional prohibitions that prevent the Bureau's administrative action) that are relevant, or at least Mr. Thompson believes that they are relevant and has argued such in his brief.

Based on the evidence from the hearing, including the evidence official noticed, and the briefs of the parties, the ALJ makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. In September of 1995, Kenneth Leip filed Articles of Incorporation for a corporation known as Grand Forks Professional Baseball, Inc. (again, "GFPB"). The purpose of the corporation was to run and manage a baseball team.

2. On January 17, 1996, Leip, as president of GFPB submitted an application for workers compensation coverage. At the time, Liep was 100% owner of the company, Leip submitted estimated payrolls with his application.

3. Based on Liep's [sic] estimates in his application for coverage, a projected premium billing statement was issued by the Bureau on February 24, 1996. Coverage included extraterritorial coverage in Montana and South Dakota. The premium billing statement was for the time period of April 1996 through March 31, 1997.

4. In April of 1996, 3,300 shares of stock in GFPB were sold. On April 3, 1996, David Thompson purchased 200 shares of stock in GFPB. On April 4, 1996, Jack Geller purchased 250 shares of stock in GFPB. On April 12, 1996,

William Coutts purchased 50 shares of stock in GFPB. Thompson, Geller, and Coutts were each members of the Board of Directors of GFPB at those times.

5. By October of 1996 Thompson, Geller, and Coutts were not only directors of the corporation, but were also officers. The exact time when they became officers is unclear because the GFPB records were destroyed in the Grand Forks flood of 1997. However, as early as April 4, 1996, Thompson was the Secretary of the corporation. By June 27, 1996, it was the intent of the shareholders of GFPB that the corporation would be managed by a management team consisting of all of the then existing corporate officers which included Thompson, Geller, Coutts, and Leip.

6. By May 15, 1996, GFPB was in default on its workers compensation premiums. The first quarterly payment of $3,890.41 was due on April 30, 1996. By May 20, 1996, GFPB had paid its first quarterly payment.

7. On October 7, 1996, GFPB was billed for the second and third quarter installment payments on the estimated premium due.

8. About this time, the other stockholders of GFPB were buying out Leip, allegedly due to his poor management abilities. Geller and Thompson each purchased 575 additional shares of stock, and Coutts purchased an additional 200 shares.

9. There is no dispute that during this time period after the buyout of Leip, Thompson, Geller, and Coutts were all still on the Board of Directors of GFPB, and further, they were all still officers of the corporation.

Geller was President, Thompson was Secretary and Coutts was Treasurer.

10. On November 21, 1996, GFPB was notified that it was in default on its workers compensation premium payments. Under the management and direction of Geller, Thompson, and Coutts, GFPB continued to default on workers compensation premiums.

11. The baseball season was set to begin in spring or early summer of 1997. Following the flood and fire of April 1997 there was reason to question the continued viability of GFPB as a corporation and its endeavors as an operating baseball team. The Board of Directors at that time, consisting in part of Geller, Thompson, and Coutts, decided to proceed with the 1997 season. This decision resulted in the incurring of further debt to the Workers Compensation Bureau by way of premiums owed.

12. During this time, Coutts dealt with the Bureau regarding confessing judgment on the outstanding premiums due. *See* exhibit B14.

13. Ultimately, on August 8, 1997, Coutts submitted actual payroll reports for the period of April 1, 1996, through March 31, 1997. The outstanding balance owed at the time for the initial premium was $24,339.63. The Bureau agreed to set up a monthly payment schedule. GFPB did not make payments on the debt.

14. Finally, on October 17, 1997, Coutts informed the Bureau that GFPB ceased all operations as of August 29, 1997. There is no explanation as to why it took two months following the cessation of operations to notify the Bureau.

15. GFPB took in almost a quarter of a million dollars in revenues during the 1997 baseball season yet never paid the Bureau any premiums during this time frame.

16. In order to complete the determination of actual premiums owed, on October 21, 1997, the Bureau made a request for GFPB to submit the actual payroll expended from April 1, 1997, through August 29, 1997. On November 17, 1997, Coutts submitted a final payroll report. *See* exhibit 19.

17. With statutory interest and penalties, which neither GFPB nor Thompson, Geller, and Coutts are contesting, the amount owed to the Bureau for unpaid workers compensation premiums as of April 5, 2001, was $34,177.83.

18. On August 18, 2000, the Bureau issued separate corporate officer liability orders to Thompson, Geller, and Coutts. In each order the Bureau concluded that as corporate officers during the relevant time frame, each of the three was personally liable for the premiums owed pursuant to N.D.C.C. § 65-04-26.1.

19. On September 13, 2000, Thompson, Geller, and Coutts collectively, through Thompson's representation, requested reconsideration and a formal hearing contesting the corporate officer liability orders. On October 20, 2000, the Bureau filed its response to the petition.

20. The Bureau has brought a civil action in the District Court of North Dakota, Grand Forks County, against GFPB seeking payment of unpaid workers compensation premiums, penalties, and interest. That action has not been finally resolved, yet, *i.e.*, it is still pending in

the district court. GFPB has not moved to dismiss this action against it in the district court.

CONCLUSIONS OF LAW

1. The version of N.D.C.C. § 65-04-26.1 that applies in this matter (the version in effect after August 1, 1995) creates three categories or groups of individuals that can be held personally liable for workers compensation premiums owed to the Bureau. Officers or directors of a corporation may be held personally liable. Managers or governors of a limited liability company may be held personally liable. Employees of a corporation or limited liability company who have 20% stock ownership and who have control of or supervision over the filing of and responsibility for filing premium reports or making payment of premiums and who fail to file the reports or make the payments as required may be held personally liable. These are three separate and distinct groups that may be held personally liable under the statute.

2. Since its amendment in 1995, the language of N.D.C.C. § 65-04-26.1 has been perfectly clear. *See* 1995 N.D. Sess. Laws, ch. 619, § 7 (1995 HB No. 1329). Prior to its amendment in 1995 N.D.C.C. § 65-04-26.1 was not entirely clear. It was poorly worded. *See* N.D.C.C. § 65-04-26.1 (1993 Suppl.). The 1995 amendment changed the wording to make the language of N.D.C.C. § 65-04-26.1 perfectly clear. The statute was no longer ambiguous.

There is now no reason to go beyond the letter of the statute to determine its meaning.[1]

3. Under the provisions of N.D.C.C. § 65-04-26.1, in effect during 1996 and 1997, the relevant time frame involved in this matter, Thompson, Geller, and Coutts were each both officers and directors of GFPB. Although it is not entirely clear when the three became officers, they were certainly at least directors of the corporation during all of the relevant time frame. Because they were each acting in a capacity as either director or officer, or both, they are each personally liable for all of the unpaid workers compensation premiums of GFPB, including interest, penalties, and costs, if GFPB does not pay the amounts of those premiums to the Bureau. GFPB is no longer in operation and has not paid the amounts of those unpaid premiums to the Bureau. Thompson, Geller, and Coutts are clearly within one of the three categories of groups that can be held personally liable for workers compensation premiums owed to the Bureau. Neither the 20% stock ownership requirement nor any other requirement found in another category applies to them. They are clearly within the officer or director category.

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[1] Even if one could successfully argue that the statute is not clear even with the amendments in 1995, *i.e.*, it is still ambiguous, the legislative history of the 1995 amendments makes it clear that the purpose of the changes in wording to N.D.C.C. § 65-04-26.1 in 1995 were to [sic] so that directors and officers of corporations can be held personally liable whether they have a 20% equity interest in the company or not and whether or not they have responsibility for payroll reports or premiums. Written Testimony on House Bill No. 1329 before the House, Industry, Business & Labor Committee, January 23, 1995, by Robert W. Morris, Assistant Attorney General.

4. Thompson, Geller, and Coutts are each personally liable to the Bureau for the total amount owed to the Bureau as of April 5, 2001, an amount of $34,177.83, plus any additional interest and penalty that may accrue until the total amount of the liability for the unpaid workers compensation premiums, interest, penalties, and costs owed by GFPB is paid.

5. The fact that the Bureau brought a collection action against GFPB to collect for unpaid premiums owing by GFPB does not bar the Bureau from seeking to impose individual liability against either Thompson, Geller, or Coutts under N.D.C.C. § 65-04-26.1. The only requirement for the Bureau to seek to impose individual liability on anyone against whom they would have authority to impose such liability under N.D.C.C. § 650-04-26.1 is that the corporation has not paid the amount it owes. GFPB is no longer in operation; it is defunct and has not paid the Bureau any of the unpaid workers compensation premiums that the Bureau has assessed and now claims is due and owing, and GFPB is not likely to pay. Therefore, the Bureau may seek to hold individuals liable. The Bureau's action against the corporation is irrelevant as long as the corporation does not pay or has not paid. It is clear from the facts in this matter that GFPB has not paid the Bureau the amount it owes. Again, it is unlikely that it ever will. Nothing in the law indicates that the Bureau must seek to collect against GFPB just because it has commenced an action against GFPB. In any event, pursuit of GFPB under a civil action would be pointless.

6. Perhaps, if the action against GFPB were dismissed with prejudice, these three individuals could argue that the Bureau may not proceed against them for personal

liability, but GFPB has not even filed a motion to dismiss the district court action against it.

7. Finally, Thompson, Geller, and Coutts make a constitutional argument which they say precludes the application of N.D.C.C. § 65-04-26.1 as to them. The ALJ will assume the constitutionality of N.D.C.C. 65-04-26.1. The ALJ has no authority to rule on constitutional issues. *Johnson v. Elkin*, 263 N.W. 2d 123 (N.D. 1978); *First Bank of Buffalo v. Conrad*, 350 N.W. 2d 580 (N.D. 1984).

RECOMMENDED ORDER

Based on the evidence presented at the hearing and under N.D.C.C. § 65-04-26.1, the applicable law, David Thompson, Jack Geller, and William Coutts are each individually liable for the entire unpaid premiums, interest, penalties, and costs owed by GFPB to the Bureau in an amount as of April 5, 2001, of $34,177.83, plus any additional interest, penalties, and costs that may accrue after April 5, 2001.

Dated at Bismarck, North Dakota, this 22nd day of June, 2001.

State of North Dakota
Workers Compensation Bureau

By: /s/ Allen C. Hoberg
Allen C. Hoberg
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA

WORKERS COMPENSATION BUREAU

IN THE MATTER OF THE ACCOUNT OF: Grand Forks Professional Baseball, Inc. a Corporation, and David C. Thompson, Individually, William Coutts, Individually, and Jack Geller, Individually	)	**ORDER** Employer Account No. 1197 672

The evidence of record has been considered and appraised. IT IS ORDERED that the recommended findings of fact and conclusions of law of the administrative law judge are adopted as the Bureau's findings of fact and conclusions of law in this matter; IT IS FURTHER ORDERED that the recommended order of the administrative law judge is adopted as the Bureau's final Order in this matter.

Dated at Bismarck, North Dakota this _____ day of _____, 2001.

North Dakota Workers Compensation Bureau

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Nick Jolliffe
Claims Operations Manager